

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY BUTLER,

Case No. 3:20-cv-00560-MMD-WGC

Petitioner,

ORDER

v.

W. GITTERE, *et al.*,

Respondents.

Petitioner Anthony Butler, a Nevada state prisoner, has filed a *pro se* Petition for Writ of Habeas Corpus (ECF No. 1-1). This habeas matter is before the Court on Butler's Response (ECF No. 6) to the Court's Order to Show Cause (ECF No. 5).

I. BACKGROUND

Butler challenges a 2012 conviction and sentence imposed by the Eighth Judicial District Court for Clark County. See *State of Nevada v. Butler*, Case No. 08C247299.¹ He entered a guilty plea to one count of sexual assault with a minor under the age of 14 and three counts of lewdness with a child under the age of 14. A judgment of conviction was entered on September 24, 2012, sentencing Butler on each count to ten years to life with the possibility of parole. Butler did not appeal the conviction or file a state petition for writ of habeas corpus within the time allowed under Nevada law. See Nev. R. App. P. 4(b) (notice of appeal must be filed within 30 days of entry of judgment of conviction); NRS § 34.726 (state petition seeking post-conviction relief must be filed within one year).

In July 2018, Butler filed a motion to modify sentence, requesting a modification because he was young when he committed the offenses, mentally unstable, and did not

¹The Court takes judicial notice of the online docket records of the Eighth Judicial District Court and Nevada appellate courts. The docket records may be accessed by the public online at: <https://www.clarkcountycourts.us/Anonymous/default.aspx> and <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 understand the court proceedings or the consequences of his guilty plea. The state court
2 denied the motion as his claims fell outside the narrow scope of claims permissible in a
3 motion to modify sentence under Nevada law.² In October 2019, the Nevada Court of
4 Appeals affirmed the state court's decision.

5 Butler filed a state petition for writ of habeas corpus in August 2018 ("2018 state
6 petition"). See *Butler v. Warden Baca*, Case No. A-18-780059-W. However, the case was
7 closed in February 2020 without a response or merits decision.

8 On September 28, 2020, Butler initiated this federal habeas proceeding *pro se* with
9 an application to proceed *in forma pauperis* ("IFP"), petition, and motion for appointed
10 counsel. (ECF No. 1.) His petition raises four grounds for relief under the United States
11 Constitution, alleging ineffective assistance of counsel ("IAC") and violations of equal
12 protection and due process. (ECF No. 1-1.) The Court denied Butler's application to
13 proceed *in forma pauperis* ("IFP") and instructed him to pay the \$5.00 habeas filing fee.
14 (ECF No. 3.) He timely complied. (ECF No. 4.)

15 On initial review of the petition, the Court issued an order to show cause why the
16 petition should not be dismissed as untimely and unexhausted. (ECF No. 5 ("OSC").)
17 Butler was informed that "his conviction became final when the time expired for filing a
18 notice of appeal with the Nevada appellate courts on October 24, 2012." (*Id.* at 3.) Absent
19 a basis for tolling or delayed accrual, the federal statute of limitations began to run the
20 following day and expired one year later, on October 25, 2013. (*Id.*) Butler filed his petition
21 over seven years after the limitations period expired. (*Id.*) In addition, the Court informed
22 Butler that the petition was likely subject to dismissal as unexhausted. (*Id.* at 4.) He did
23 not challenge his conviction on direct appeal, and his untimely 2018 state petition was
24 dismissed without a response or merits decision. (*Id.* at 5.) The Court pointed out that,

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26 ²In Nevada, a motion to modify or correct sentence may only challenge the facial
27 legality of the sentence—*i.e.*, either the state district court was without jurisdiction to
28 impose a sentence or the sentence was imposed in excess of the statutory maximum. See
Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

1 although Butler “litigated a motion to modify his sentence through one complete round of
2 state proceedings, the available state records indicate that his request was based on
3 Nevada law—not the United States Constitution—and involved completely different factual
4 allegations.” (*Id.* (citing *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005)).) Given
5 these facts, the Court ordered Butler to show cause in writing why this action should not
6 be dismissed with prejudice as untimely and/or unexhausted and denied his request for
7 appointed counsel. (*Id.* at 6.)

8 **II. DISCUSSION**

9 Butler’s OSC Response (ECF No. 6), drafted with another inmate’s assistance,
10 attaches multiple exhibits and argues that dismissal is inappropriate. Concerning
11 exhaustion, he claims that the proceedings on his motion to modify his sentence satisfied
12 the exhaustion requirement because he raised IAC issues through one complete round of
13 state post-conviction proceedings. (*Id.* at 3.) He contends that the IAC issues are now ripe
14 for federal review, “regardless of procedural inappropriateness.” (*Id.*) With regard to
15 timeliness, Butler’s arguments imply that he may be entitled to equitable tolling of the
16 statute of limitations outlined in the Antiterrorism and Effective Death Penalty Act, 28
17 U.S.C. § 2241(d)(1). Butler argues, among other things, that trial counsel did not advise
18 Butler of his right to file a direct appeal or turn over his case file, which kept him from timely
19 filing a state habeas petition. (*Id.* at 5-6.)

20 The Court concludes that Butler’s assertions regarding exhaustion and equitable
21 tolling would benefit from further briefing and the complete state court record. Accordingly,
22 the Court will direct service of the petition.

23 Additionally, the Court will vacate the prior denial of Butler’s motion for appointment
24 of counsel and grant his request. (ECF Nos. 1-2, 5.) There is no constitutional right to
25 appointed counsel in a federal habeas corpus proceeding. See *Luna v. Kernan*, 784 F.3d
26 640, 642 (9th Cir. 2015) (citing *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007)).
27 However, the Criminal Justice Act (“CJA”), 18 U.S.C. § 3006A, authorizes the court to
28 appoint counsel “when the interests of justice so require.” *Id.* § 3006A(a)(2). The CJA

1 further provides that a habeas petitioner must demonstrate financial eligibility in all
2 circumstances where the court appoints counsel. See *id.* § 3006A(a) (counsel “shall be
3 provided for any *financially eligible person*”) (emphasis added).

4 From the papers presented, it appears that Butler potentially will rely at least in part
5 on medical and mental health issues as a basis for overcoming a possible dismissal of the
6 petition as untimely. (ECF No. 6 at 7.) Butler’s OSC Response reports a diagnosis of
7 schizophrenia and bipolar disorder (*Id.* at 28), and his original request for counsel asserted
8 that he is “mentally or physically handicapped” (ECF No. 1-2 at 2). Consistent with his
9 representations, the docket records in Butler’s criminal case show that the state court held
10 multiple hearings to determine his competency to stand trial due to mental health issues.
11 In past cases before the Court, inmates have not always been able to effectively review
12 and present their medical records to the Court due to correctional facilities’ restrictions on
13 inmate access, possession, and transmittal of those records. Such restrictions may hinder
14 Butler’s ability while proceeding *pro se* to present equitable tolling arguments.

15 Here, the Court finds that appointing counsel is in the interests of justice, taking into
16 account: (1) Butler’s lengthy sentence structure, including multiple sentences of ten years
17 to life with the possibility of parole; (2) his medical and/or mental health issues; (3) his
18 relatively limited demonstrated ability to articulate his claims *pro se* without inmate
19 assistance; and (4) the potentially complex procedural issues regarding the timeliness of
20 the petition. Although the Court denied Butler’s IFP application based on the amount of
21 money in his inmate trust account and average monthly deposits, Petitioner’s ability to pay
22 the \$5.00 filing fee does not show that he can afford counsel to litigate this case. For the
23 purposes of appointing counsel under the CJA, the Court finds that Petitioner’s IFP
24 application sufficiently demonstrated financial eligibility. Accordingly, the Court
25 provisionally appoints the Federal Public Defender’s Office as counsel for Butler.

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1 **III. CONCLUSION**

2 It is therefore ordered that the Clerk of Court add Nevada Attorney General Aaron
3 D. Ford as counsel for Respondents and provide Respondents an electronic copy of all
4 items previously filed in this case by regenerating the notices of electronic filing to the
5 Nevada Attorney General's office only.

6 It is further ordered that Respondents' counsel must enter a notice of appearance
7 within 21 days of entry of this order, but no further response is required from Respondents
8 until further order of the Court.

9 The Clerk of Court is further instructed to file Petitioner Anthony Butler's Petition for
10 Writ of Habeas Corpus (ECF No. 1-1).

11 It is further ordered, on *sua sponte* reconsideration, that the portion of the Order
12 (ECF No. 5) denying Butler's Motion for Appointment of Counsel (ECF No. 1-2) is vacated,
13 and the motion is granted.

14 The Federal Public Defender is provisionally appointed as counsel for Butler, and
15 will have 30 days to undertake direct representation of Butler or to indicate the office's
16 inability to represent Butler in these proceedings. If the Federal Public Defender is unable
17 to represent Butler, the Court will appoint alternate counsel. The counsel appointed will
18 represent Butler in all federal proceedings related to this matter, including any appeals or
19 *certiorari* proceedings, unless allowed to withdraw. A deadline for the filing of an amended
20 petition and/or seeking other relief will be set after counsel has entered an appearance.
21 The Court anticipates a deadline of approximately 90 days from entry of the formal order
22 of appointment.

23 Any deadline the Court sets and/or any extension thereof will not signify any implied
24 finding of a basis for tolling during the time period established. At all times, Butler remains
25 responsible for calculating the running of the federal limitation period and timely presenting
26 claims. That is, by setting a deadline to amend the petition and/or by granting any
27 extension thereof, the Court makes no finding or representation that the petition, any
28 amendments thereto, and/or any claims contained therein are not subject to dismissal as

1 untimely. See *Sossa v. Diaz*, 729 F.3d 1225, 1235 (9th Cir. 2013).

2 The Clerk of Court is finally directed to send a copy of this order to the *pro se*
3 Petitioner, the Nevada Attorney General, the Federal Public Defender, and the CJA
4 Coordinator for this division.

5 DATED THIS 30th Day of December 2020.

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CHIEF UNITED STATES DISTRICT JUDGE